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A BENCH EYE VIEW OF THE BAR

COLLINS J. SEITZ*

The South Carolina Law Review is pleased to print the address made by Chancellor Collins J. Seitz of Delaware on April 19, 1963, to the Southern Law Review Conference at its annual meeting held this year at Columbia, with the South Carolina Law Review as convention host. Chancellor Seitz's speech is, we believe, of general interest, not only because of his views on the value of law reviews, but also because his address presents a judge's view of lawyers—in this case, the view of an able and long-experienced judge.

Chancellor Seitz was first appointed as a Vice-Chancellor in Delaware in 1946, at the age of 31. In 1951, he became Chancellor—a position which he still holds by appointment of the Governor, and confirmation by the Senate, of Delaware. On June 17, 1963, he began a second twelve-year term in his judicial post. As his article points out, his court has statewide jurisdiction in equity, including the all-important administration of the Delaware corporation law. His court has decided some of the most important corporation law issues ever adjudicated, and continues to do so. Many of these decisions are not appealed, but stand as persuasive judicial authority throughout the United States, chiefly because of the careful reasoning which characterizes the decisions of this notably able tribunal.

Chancellor Seitz's contributions can readily be measured merely by noting some of the important cases which he has personally decided. This includes the famous Loews' litigation which, beside their much publicized dramatic interest, determined important legal issues arising in a proxy fight for corporate control.¹ Coyne

*Chancellor of the State of Delaware.

1. *Campbell v. Loews, Inc.*, 36 Del.Ch. 563, 134 A.2d 852 (Del.Ch. 1957), and the prior opinion in *Tomlinson v. Loews*, 36 Del.Ch. 516, 134 A.2d 518 (Ch. 1957), *aff'd*, 37 Del.Ch. 8, 135 A.2d 136 (S.Ct. 1957). Other opinions of Chancellor Seitz in the same litigation appear at 36 Del.Ch. 533, 134 A.2d 565 (Ch. 1957), and 37 Del.Ch. 17, 136 A.2d 191 (Ch. 1957).

v. Park & Tilford Distillers Corp.,² resolved novel issues under the Delaware short form merger statute, a prototype for many other such enactments.³ The Ringling Brothers case dealt with important problems of pooling shareholder vote and dealing with the shareholder who refuses to comply with the contract terms.⁴ Chancellor Seitz's judicial decisions also embrace problems of transferring corporate control through transfers of voting stock.⁵ The formulation and application of valuation standards in connection with shareholder appraisal rights is a frequent subject of his decisions.⁶ Various cases display insight into insider fiduciary duties in the complex transactions of modern business,⁷ including application of the broad mandate of reasonableness of executive compensation,⁸ most recently in the mutual fund cases, several of which have now been decided.⁹ But corporation law cases comprise only one segment of the work of the Delaware Court of Chancery and of Chancellor Seitz's judicial product, which also includes important decisions in the field of trusts, real property, and other traditional subjects of equity jurisdiction.

*The Review takes pride in publishing Chancellor Seitz's address.—Ernest L. Folk, III.***

2. 37 Del.Ch. 558, 146 A.2d 785 (Ch. 1958), *aff'd*, 38 Del.Ch. 514, 154 A.2d 893 (S.Ct. 1959).

3. Cf. S.C. CODE §12-20.5 (Supp. 1962).

4. Ringling v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc., 29 Del.Ch. 318, 49 A.2d 603 (Ch. 1946), *modified*, 29 Del.Ch. 610, 53 A.2d 441 (S.Ct. 1947).

5. Manacher v. Reynolds, 165 A.2d 741 (Del.Ch. 1960). See also Smith v. Good Music Station, Inc., 36 Del.Ch. 262, 129 A.2d 242 (Ch. 1957).

6. *E.g.*, Sporborg v. City Specialty Stores, Inc., 35 Del.Ch. 560, 123 A.2d 121 (Ch. 1956).

7. *E.g.*, Sterling v. Mayflower Hotel Corp., 33 Del.Ch. 20, 89 A.2d 862 (Ch.), *aff'd*, 33 Del.Ch. 293, 93 A.2d 107 (S.Ct. 1952). See also Greene v. Allen, 35 Del.Ch. 242, 114 A.2d 916 (Ch. 1955), *rev'd*, 35 Del.Ch. 479, 121 A.2d 919 (S.Ct. 1956).

8. Compare Chancellor Seitz's opinion in Kerbs v. California Eastern Airways, Inc., 32 Del.Ch. 219, 83 A.2d 473 (Ch. 1951), *rev'd*, 33 Del.Ch. 69, 90 A.2d 652, (S.Ct. 1952), *on reargument*, 33 Del.Ch. 174, 91 A.2d 62 (S.Ct. 1952), *subsequent opinion on remand*, 33 Del.Ch. 395, 94 A.2d 217 (Ch. 1953), *with* Beard v. Elster, 160 A.2d 731 (Del.S.Ct. 1960), *on remand*, 167 A.2d 231 (Del.Ch. 1961).

9. Saminsky v. Abbott, 185 A.2d 765 (Del.Ch. 1961); Saxe v. Brady, 184 A.2d 602 (Del.Ch. 1962); Lutz v. Boas, 171 A.2d 381 (Del.Ch. 1961).

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I am of course delighted and honored to break bread with the representatives of the Southern Law Review Conference and their guests. I am particularly warmed by the hospitality of Dean Figg, Professor Folk and the other members of the faculty of the University of South Carolina School of Law.

I am informed that your Conference has been in existence for 15 years. The member schools of your conference have both a community of interest and a variety of problems. An annual meeting of student editors of the various law reviews gives each school an invaluable opportunity to share such interests and at the same time to discuss solutions to many of your problems.

I do not propose to talk about your plans and problems. I would only be speculating. Moreover, I know you have been or will be dissecting some of them during this Conference. In this way each law review and thus each law school is strengthened. A further important consequence is the improvement in the quality of this important part of our national legal literature.

As the decisions editor of the Virginia Law Review (too many years ago) I know how valuable law review work is to the editors themselves in their future careers—whether as lawyers, judges or otherwise. And to the law review material, I can say as a practicing lawyer and now as a judge for over 17 years that high quality law review work, student notes and recent decisions as well as leading articles, are of prime importance. And, if I may say so, the true hallmark of quality in legal writing is careful analysis and reasoning—basic tools in your trade as editors. Since no segment of the legal fraternity has a monopoly on these processes, it follows that a student note or decision may be more helpful or persuasive than a platitudinous leading article, or even another *ipse dixit* court decision. Thus, student editors, and faculty advisers must emphasize the importance of careful analysis and familiarity with the subject matter. Incidentally, a sprinkling of humility is also in order when you come to analyze what has gone before. After all, even an old decision may be correct.

Now, I do not mean to discourage criticism. It is healthy and important, but it is valuable only when it justifies itself

in the quality of its analysis and an awareness of the "world outside." So much for preaching.

Since most of you are preparing for an early exposure to the realities of the practice of law in some form, I thought you might be interested in what you may experience.

I

We all have images of what particular types should look like. To the average member of the public the stereotype of a judge is an elderly gentleman who is balding or graying. While I now possess at least some of these characteristics, when I became a judge at 31 years of age I often found that the public just couldn't believe it.

It is also interesting to have the title "Chancellor." Since few states other than Delaware have retained the separation of law and equity, my title is somewhat of a legal anachronism. Actually, the Delaware Court of chancery is a direct descendant of the High Court of Chancery of Great Britain. I am the 14th Chancellor in Delaware since the separation. Much of our jurisdiction is "pure equity." However, we are also given statutory jurisdiction over such things as the affairs of Delaware corporations. People often ask why so many corporations incorporate in Delaware. The answer: legal stability, flexibility, reasonable predictability and low taxes—the four loves of the businessman. Parenthetically, other states are cutting into our business for obvious reasons.

Our jurisdiction over Delaware corporations opens up many interesting and involved areas of business activity both in this country and abroad. I think this can be appreciated if we realize that perhaps one-half in value of the shares traded on the New York Stock Exchange represents shares of Delaware corporations. Large and small, they have their problems and many of these problems end up in the Delaware Court of Chancery. One day we are called upon to decide which faction controls the Ringling Brothers Circus—a Delaware corporation. The next day we may have to resolve a proxy fight involving control of Metro-Goldwyn-Mayer. We go from the legality of the merger of the Mayflower Hotel into the Hilton chain to the huge mutual fund cases and the charges of excessive management fees.

I thought you might be interested in a judge's view of lawyers in action and certain types thereof. I hope you won't consider me presumptuous in assuming that the judicial view of the Bar, and vice versa, in your state will be the same as it is in Delaware. Of one thing I'm certain—the losing lawyer's view of the judge is the same everywhere. I'm certain you will not recognize the future "you" among the stereotypes.

A judge comes to realize that most members of the Bar fall into certain broad classes. There are those who burn the midnight oil and those who practice off the tops of their heads; there are those who want to fight the case to the bitter end and those who want to settle at all costs. The latter are often said to be "afraid of the Court House steps." There are those who are eager and those who are timid. There are those who are gentlemen and those who are not. Of course, there are also those who do not precisely fit any category. These are the "characters" and every Bar needs a few to add spice to the practice of law.

But to be serious for a moment, I want to say something which perhaps ought to be kept within the fraternity. It is this: many cases decide themselves. Otherwise stated, no matter how well or poorly tried, the same result would obtain without regard to the talents of the winning lawyer. This may be so for a variety of reasons. First, of course, there is no substitute for facts which neatly fit controlling precedents. Second, the facts, albeit poorly presented, show such an overwhelming equity on one side that only one result is possible. Third, there is an outstanding emotional approach on one side which can be made to fit some legal principle. The judge, some lawyers to the contrary, is generally in tune with appeals which would strike the average person as particularly persuasive.

The strength of the true advocate is tested by those cases falling within the gray area. These cases often require a painstaking search for facts and a keen analysis of legal principles. And finally, the ultimate touchstone is the ability to present their results logically and forcefully. The "hidden" facts are often decisive.

The judge, like anyone else, appreciates a smooth presentation. Anything "out of line" distracts and may lead the

judge away from important evidence. Thus, it is important for a lawyer "to object or move to strike" rather than to get up and "wonder what some particular evidence may have to do with the case." My response to such legal soliloquies generally is to say that there is nothing before the court to be ruled on. Or, take another facet of trial practice. It is surprising how much trouble some lawyers have in getting a document into evidence. Then there is the lawyer who is forever asking his opponent to stipulate to facts he himself isn't prepared to prove. These types are often more of a trial than the case itself.

Speaking generally, once again, the trial judge cannot help but be impressed by a systematic presentation of the facts. Like a suspense play, the facts should be marshalled so as to present at the last curtain a feeling that but one outcome is possible. As I have stated, to achieve this cumulative effect great preparatory effort is frequently required. Part of this preparation must concern itself with "witness preparation." On occasion that is a euphemism. Of course, there is a danger of "overdoing it" and creating the appearance of a purely rehearsed performance. Do not try to change a man's personality on the stand by suggesting an out-of-character vocabulary.

It might amuse you and educate you if I were to describe some of the types of lawyers who leave various impressions on the judge in Chambers and in court.

IN CHAMBERS:

1. "The Late Mr. Smith." Always tardy and never without what he considers an appropriate excuse.

Judge's Reaction: "What will it be this time?"

2. "The Perfect Mr. Jones." Every mistake in his pleading and otherwise is that of his secretary or of some young man in the office—never his own.

Judge's Reaction: "I wonder what he tells his wife?"

3. "Back Door William." He's very sanctimonious. He insists he doesn't want to talk about his case in the absence of opposing counsel *but . . .*

Judge's Reaction: "Who does he think he's fooling?"

4. "The Anticipatory Mr. Brown." No matter what the judge starts to say he interrupts and attempts to finish what

he believes the judge was about to say. If he anticipates correctly he has shown the judge how discerning he is; if he anticipates incorrectly, he has nevertheless shown the judge his legal erudition.

Judge's Reaction: "My time will come."

ON THE BENCH:

1. "Never-ready John." "If Your Honor would indulge me for a few minutes before commencing."

Judicial Reaction: "Here we go again."

2. "Mr. Fairhead." Constantly saying, "I want to be entirely fair with the court."

Judicial Reaction: "And why not?"

3. "Authorities Unlimited." "Your Honor, the cases are legion in support of my position."

Judicial Reaction: "Just one, please."

4. "The Trail Blazer." "Does Your Honor follow me?"

Judicial Reaction: "Not always, thank goodness."

5. "The Elder Statesman." "Your Honor is not old enough to remember it but many years ago . . ."

Judicial Reaction: "Time will cure that."

6. "Unburdening Type." Plaintively, "Here's my problem, Your Honor."

Judicial Reaction: Temptation to say, "See a lawyer."

II

Since the ultimate goal of advocacy is, juries apart, persuasion of judges, I think it is helpful to mention some of the factors which are persuasive, with the degree depending upon numerous other considerations.

First and foremost the lawyer should study the judge who is to be persuaded. Preparation, unrelated to the traits of the judge involved, is faulty indeed. And this is not to say that success is a matter of mere judicial personality analysis. However, analysis should enable you to know whether a simple or a detailed presentation of one or more points is in order. This may depend on the judge's knowledge or experience in a particular area. A few years ago I heard an involved trade-secret case involving reflective insulation with its complicated heat transfer principles. It would have been

folly to have made a simple presentation of those principles to me.

It is also important to know whether the judge "prepares" for his case before trial and argument. This becomes known rather soon about any judge. If he does prepare, a great deal may be assumed that cannot be taken for granted if the judge has to be educated completely. Pre-trial procedure often gives you a tip-off.

It goes without saying that knowledge of the judge's predilections are important. I say this because the use of witnesses may frequently be determined by this knowledge. When we interview witnesses we often realize that a particular one is no asset because of limited intelligence, poor personality, etc. As one who once practiced law, I say deliver me from the witness who cannot resist some gratuitous insult or antagonizing expression from the witness stand.

Then there are certain expressions which should be avoided by lawyers at all cost. For example:

1. The City Slicker lawyer trying a matter in a small town should never tell the judge, *a fortiori* the jury, that "we do it differently in New York."

2. The militant advocate who responds to some statement of the judge by saying "Your Honor is wrong."

The statement may well be true, but many judges seem to prefer some less direct form of accusation of error, such as "Your Honor's understanding of the facts or law differs from mine."

3. Then there is the type of lawyer who defies description. He is wont to approach the judge with this seemingly innocent question, "Is Your Honor busy?"

III

Now that I have looked at some of the lawyer types from the viewpoint of the judge, the "equal time" doctrine requires that I speak of the lawyer looking at the Bench. Preliminarily, I must say that the silence of attorneys in this area in the presence of a judge is no evidence that definite views concerning the judge are not entertained. Some judges tend, erroneously on occasion, to equate silence with approbation.

May I say that judges have as many foibles as do the lawyers and not all of them are hidden beneath the robe or concealed by their aloofness on the Bench. Consider some of them:

1. "Part-Time Judges." These are judges who spend more time in recesses than they do in the trial. This may be for a variety of reasons extending from internal weaknesses to an excessive interest in other activities.

2. "Judicial Sphinx." He reacts not at all. The lawyers look in vain for a clue as to his reaction, if only to the weather. His opposite is the judicial interloper who interrupts the lawyer's presentation constantly and often unnecessarily.

3. "Lawyer's Favorite." The judge who constantly admits evidence subject to a motion to strike if not connected later. It is so easy for a lawyer to remember these matters as a long trial progresses.

4. The all time favorite judge, if you'll pardon some sarcasm, is he who decides against you without giving any reason. This type of decision is particularly easy to explain to a disgruntled client.

And in the trial of a case there are two things of which you can be positive. If the court assumes a material fact in your favor, your case is lost. If the court admits your evidence for "what it's worth," it's not worth much.

Needless to say, many of my remarks have perhaps been overdrawn. Ours is a great profession and the vast majority of its members, whether serving as lawyers or judges or in some other capacity, live up to its high standards and traditions. However, since the work product of our wonderful profession so frequently involves a combination of the humorous and the serious, I thought a little of both would be in order. I think it is also desirable for all of us—professors, judges, lawyers and lawyers-to-be—to look into our professional mirror on occasion so that we may bring ourselves into sharper focus with the objectives of our profession. And it is important that we realize that it is our own image we see and not be like the lady at the cocktail party who told her husband to stop drinking because he was getting blurred.

What I have seen during my visit to South Carolina has not only been personally pleasant but, more important, has been professionally stimulating and reassuring. I congratulate the members of the Conference and wish you well for the future.